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Attorneys for CITY OF SAN JOSE

UNITED STATES DISTRICT COURT  
COUNTY OF SANTA CLARA  
SAN JOSE DIVISION

FFV COYOTE LLC, a Washington limited liability company; EMC7, LLC, a Washington limited liability company; ERIC F. BONETTI; DAVID R. BONETTI; GLEN C. KRAL and SUSAN S. KRAL, as Trustees of the Kral 1994 Trust; BENSON GROUP LLC, a California limited liability company; JEAN BEU, as Trustee of the Jean Beu California Property Trust; LEE LESTER/BAILEY LLC, a California limited liability company; and F.R. LESTER CAPITAL, LLC, a California limited liability company

Plaintiff(s),

v.

CITY OF SAN JOSE, a municipal corporation; DOES 1 through 10,

Defendant(s).

Case Number: 5:22-CV-00837-VKD

**DEFENDANT CITY OF SAN JOSE'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES AND DECLARATION  
OF MARGO LASKOWSKA IN  
OPPOSITION TO PLAINTIFF'S  
MOTION TO STAY ACTION**

Date: March 21, 2023

Time: 10:00 a.m.

Courtroom 2, Fifth Floor

Hon. Virginia K. DeMarchi

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 The City of San Jose opposes Plaintiffs' motion for stay and disagrees that a stay is  
3 appropriate or conducive to this case's resolution.

4 The City urges the Court not to delay the City's ability to pursue discovery and  
5 dispositive motions. The progress of this lawsuit should not be impeded by a speculative  
6 outcome of whatever regulatory process Plaintiffs decide to pursue in the future or by a  
7 supposition that the parties may reach a settlement.

8 On February 14, 2023, the Plaintiffs received the City's response to their preliminary  
9 review application so there is no regulatory land use process currently pending regarding  
10 Plaintiffs' properties. Should Plaintiffs decide to submit a formal (rather than a preliminary)  
11 development application, the process of applying for and obtaining decisions on the  
12 various required entitlements is likely to take substantially longer than six months.  
13 Therefore, a six month stay of this litigation is unlikely to promote economy of time and  
14 effort for the Court and the litigants. Settlement efforts and litigation may proceed in  
15 parallel.

16 Instead of issuing a stay, the Court may address Plaintiffs' request by extending the  
17 trial date and the related deadlines. That would avoid prejudice to the City's ability to  
18 develop its defense in a timely manner.

19 Should the Court nevertheless decide to issue a stay, the City requests that it  
20 remain in place no longer than 90 days.

21 Respectfully submitted,

22 Dated: February 22, 2023

NORA FRIMANN, City Attorney

24 By: /s/ Margo Laskowska  
25 MARGO LASKOWSKA  
Sr. Deputy City Attorney

26 Attorneys for CITY OF SAN JOSE

**DECLARATION OF MARGO LASKOWSKA**

1. I am an attorney at law duly licensed to practice in the courts of this State and in this Court. I am a Senior Deputy City Attorney and the attorney of record for the City of San Jose in the present litigation. I have personal knowledge of the facts stated in this declaration and if called as a witness I would testify competently to these facts.
2. In October 2022, Plaintiffs submitted a preliminary review request to the City for development of their parcels. A preliminary review application is a request for consultation and not a formal project application.
3. On February 14, 2023, the City of San Jose issued a response to Plaintiffs' preliminary review application. A true and correct copy of the City's response is attached here as Exhibit 1. A response to a preliminary review application is a consultation and not a final review of a formal project application.
4. At page 8, the City's response describes next steps available to Plaintiffs should they decide to pursue a formal Planning entitlement application. I am informed that a formal project application will likely take substantially longer than six months.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on February 22, 2023.

/s/ Margo Laskowska  
Margo Laskowska

# EXHIBIT 1



*Planning, Building and Code Enforcement*

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February 14, 2023

Chuck Reed  
Hopkins Carley  
[chuckreed@hopkinscarley.com](mailto:chuckreed@hopkinscarley.com)

**LOCATION AND ADDRESS:** Southeast side of Bailey Avenue between Monterey Road and Santa Teresa Boulevard (APNs: 712-01-004, 010 & 012)

**RE. File No. PRE22-188:** Preliminary Review to explore the possibility of a Planned Development Rezoning to allow the construction of a utility facility (energy storage and transmission facility) on an approximately 128-gross acre site. This preliminary review does not address the potential use for the California Independent Systems Operator (CAISO) transmission facility.

Dear Mr. Reed,

Thank you for submitting a Preliminary Review for the above proposal. Our goal with the Preliminary Review process is to work with you to determine whether the project is feasible under the General Plan. Below are our comments and analysis of your prospective project regarding consistency with the City of San José Envision 2040 General Plan and other applicable City regulations and policies:

**Key Issues and Concerns**

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Staff has reviewed your application and determined that the project, as proposed, is **inconsistent** with the Agriculture General Plan Land Use Designation and the Coyote Valley Agriculture Overlay. In addition, the project, as proposed, is inconsistent with multiple General Plan policies, which are further detailed in this letter. Should you wish to proceed with applying for a development permit, you would need a General Plan amendment and rezoning for the site to be consistent with the City's General Plan and zoning.

**General Plan Conformance** – The project site is in the Coyote Valley Agriculture Overlay which is applied to the existing agricultural lands in Coyote Valley which are within the City's Sphere of Influence. The proposed uses would constitute an intensification of use on the site which directly conflicts with General Plan objectives to ensure “the viability for agriculture and discourage parcel fragmentation” and maintain agricultural lands “to facilitate local food production, to provide community access to healthful foods, to maintain a unique community character, and to promote the environmental, fiscal, and economic benefits of rural agricultural lands”<sup>1</sup>.

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<sup>1</sup> Envision San José 2040 General Plan, Chapter 5, Page 22

## Preliminary Review

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### 1. Project Description

Based on the conceptual information you provided in your initial application on October 31, 2022, at the follow up meeting with Planning staff on December 2, 2022, and in the follow up email dated on January 31, 2023, we understand the project to include a Planned Development Zoning or Conditional Use Permit to allow an energy storage system, regional transmission facility, and associated electrical transmission lines on an approximately 128-gross-acre site.

### 2. Additional Site Information

The site is classified as *Prime Farmland* pursuant to the [California Farmland Mapping and Monitoring Program](#). *Prime Farmland* is defined as “Irrigated land with the best combination of physical and chemical features able to sustain long term production of agricultural crops. This land has the soil quality, growing season, and moisture supply needed to produce sustained high yields. Land must have been used for production of irrigated crops at some time during the four years prior to the mapping date”.<sup>2</sup> Notably, converting *Prime Farmland* to a non-agricultural use is considered a potentially significant impact under the California Environmental Quality Act. It should also be noted that Assembly Bill 948, Coyote Valley Conservation Program, which was signed into law in 2019, recognizes that Coyote Valley “is a resource of statewide significance” which is characterized by “a unique landscape providing agricultural, wildlife, recreational, climate, and other natural infrastructure benefits”.<sup>3</sup>

### 3. General Plan Consistency

The subject site is designated **Agriculture** on the Land Use/Transportation Diagram of the [Envision San José 2040 General Plan](#); the site is also located in the Coyote Valley Agriculture Overlay.

#### **Agriculture**

Density: 1 DU/AC; minimum 20-acre parcels (1 to 2.5 stories)

Sites in the Agriculture designation are intended for a variety of agricultural uses, including grazing, dairying, raising of livestock, feedlots, orchards, row crops, nursery stock, flower growing, ancillary residential uses, ancillary commercial uses such as fruit stands, and the processing of agricultural products. Consistent with other Envision General Plan goals and policies, agricultural practices are encouraged which follow ecologically sound practices and which support economic development, provide open space and link to the region’s history. The Agriculture designation supports more intensive agricultural uses than are supported by the Open Hillside designation. Private Recreation uses which are rural in character and are compatible with the Coyote Creek Park Chain and Council Policy 6-34: Riparian Corridor

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<sup>2</sup> Farmland Mapping and Monitoring Program, Important Farmland Categories, (<https://www.conservation.ca.gov/dlrp/fmmp/Pages/Important-Farmland-Categories.aspx>)

<sup>3</sup> Assembly Bill 948, Coyote Valley Conservation Program

Protection and Bird-safe Design are allowed east of Monterey Highway between Metcalf Road and 1,400 feet south of Palm Avenue.

Building intensity in this designation will be greatly limited. The minimum parcel in areas designated as Agriculture is 20 acres in size. This designation is intended to support existing and future agricultural uses on properties. No uses or structures are allowed that would require urban services, such as sanitary sewers or other urban street improvements. Some ancillary, supportive uses can be allowed in accordance with the Rural Agriculture Goals & Policies in the Envision General Plan.<sup>4</sup>

### **Coyote Valley Agriculture Overlay**

Coyote Valley Agriculture Overlay Density: up to 1 DU/40 AC; minimum 40-acre parcels The Coyote Valley Agriculture Overlay (CVAO) is applied to certain specified properties in Coyote Valley that have an underlying Agriculture land use designation. The CVAO is intended to protect and preserve agricultural lands to facilitate local food production, to provide community access to healthful foods, to maintain a unique community character, and to promote the environmental, fiscal, and economic benefits of rural agricultural lands. Sites within this overlay are intended for a variety of agricultural uses consistent with the Agriculture land use designation. Development intensity in this designation will be limited in order to preserve the viability for agriculture and discourage parcel fragmentation in Coyote Valley. The minimum parcel size for new subdivisions in areas within the Coyote Valley Agriculture Overlay is 40-acres. Existing parcels less than 40 acres can remain at the current size, and contain uses consistent with the underlying Agricultural land use designation, but cannot subdivide further.”<sup>5</sup>

### **General Plan Goals and Policies - Rural Agriculture**

Agriculture is a significant part of San José’s history and will continue to be a part of its future. The Envision San José 2040 General Plan has two sets of goals and policies related to agriculture – rural and urban. This section addresses the rural agriculture goals and policies.

San José’s rural agriculture provides a wealth of health, social, environmental, and economic benefits for the City’s community. Agricultural lands add to a distinct image of San José’s community, and the agricultural preservation policies work in concert with the Envision General Plan’s Greenline/Urban Growth Boundary and open space preservation strategies. Either directly or indirectly, the Rural Agriculture Goals, Policies, and Implementation Actions promote every Element of the Plan Vision. Those policies are intended to preserve agricultural land; improve the community’s access to healthful foods; promote local and ecologically sound food production; support the ability of farmers in the region to sell their produce locally; and provide environmental, social, and economic benefits to the community. Rural Agriculture Policies primarily address agricultural properties that are not anticipated to urbanize within the lifetime of this Envision General Plan, including lands designated as

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<sup>4</sup> Envision San José 2040 General Plan, Chapter 5, Page 17

<sup>5</sup> Envision San José 2040 General Plan, Chapter 5, Page 22

Agricultural or Urban Reserve on the Land Use / Transportation Diagram and lands designated as Open Hillside on which the primary use is agriculture.

The agricultural potential of the Santa Clara Valley was recognized early. Orchard products dominated agricultural production, which was by far the predominant use in San José and Santa Clara County by the end of the 19th century. Fruit production in San José peaked in the 1920s, and the canning and packing industry quickly grew. San José was known as the “Valley of the Heart’s Delight.”

Today, the boundaries of the City have spread and residential land uses dominate San José’s landscape. Little agricultural production remains in San José; however, the community and the City have a renewed recognition of the importance of local agriculture for food security, access to healthful foods, groundwater recharge, and environmental benefits of local food production and consumption.<sup>6</sup>

The proposed project would be **inconsistent** with the following General Plan policies:

Goal LU-20 – Rural Agriculture: Provide and protect sufficient agricultural land to facilitate local food production, to provide broad community access to healthful foods, to add to a distinct community image, and to promote environmental, fiscal, and economic benefits of rural agricultural lands.<sup>7</sup>

Land Use Policy LU-20.1: Protect and preserve the remaining farmlands within San José’s sphere of influence that are not planned for urbanization in the timeframe of the Envision General Plan, such as mid- and south Coyote Valley, through the following means:

1. Strongly discourage conversion of agricultural lands outside the Urban Growth Boundary to non-agricultural uses.
2. Limit residential uses in agricultural areas to those which are incidental to agriculture.
3. Prohibit subdivision of agricultural lands, unless it can be established that the subdivision would not reduce the overall agricultural productivity of the land and that viable agricultural operations would be sustained.
4. Encourage contractual protection for agricultural lands, such as Williamson Act contracts, agricultural conservation easements, transfers of development rights, or other property tax relief measures as incentives for preservation of these lands.
5. Restrict land uses within and adjacent to agricultural lands that would compromise the agricultural viability of these lands. Require new adjacent land uses to mitigate any impacts on the use of agricultural lands.
6. Require ancillary non-agricultural land uses on agricultural lands to be ancillary to and compatible with agricultural land uses, agricultural production, and the rural character of the area, and to enhance the economic viability of agricultural

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<sup>6</sup> Envision San José 2040 General Plan, Chapter 6, Page 32

<sup>7</sup> Envision San José 2040 General Plan, Chapter 6, Page 33



operations.<sup>8</sup>

Land Use Policy LU-20.2: Preserve agricultural lands and prime soils in non-urban areas in order to provide local and regional fresh food supplies, reduce dependence on foreign products, conserve energy, and retain the aquifer recharge capacity of these lands.<sup>9</sup>

Land Use Action LU-20.14: Shift the Urban Service Area boundary north in Coyote Valley in the future, and prohibit the shifting of the Urban Service Area boundary south in Coyote Valley. Properties designated for urban uses should remain within the Urban Service Area.<sup>10</sup>

Goal LU-12 – Urban Agriculture: Expand the cultivation and sale of locally grown agriculture as an environmentally sustainable means of food production and as a source of healthy food for San José residents.<sup>11</sup>

Land Use Policy LU-12.4 Preserve agricultural lands and prime soils in non-urban areas in order to retain the aquifer recharge capacity of these lands.<sup>12</sup>

*Staff Comments: The proposed project would remove the site from agricultural use in its entirety, which is inconsistent with the core objectives of the CVAO and the Rural Agriculture General Plan Policies. As discussed above, the site is classified as Prime Farmland pursuant to the [California Farmland Mapping and Monitoring Program](#). These policies explicitly call for maintaining agricultural lands and prime soils in non-urban areas, and specifically reference lands that are not planned for urbanization in the timeframe of the Envision San José 2040 General Plan, such as the subject property. Policy LU-20.1 anticipates some non-agricultural land uses on agricultural land but only those uses that are “ancillary to and compatible with agricultural land uses, agricultural production, and the rural character of the area” and that “enhance the economic viability of agricultural operations”. The proposed energy storage and transmission facility is neither ancillary to an agricultural land use or agricultural production nor would it enhance the economic viability of agricultural operations.*

*We recognize the Climate Smart strategies listed in your letter and you are correct that the proposed use would support energy resilience and sustainability. However, the overall need for energy resiliency does not override the geographic-specific policies calling for preservation of agricultural lands in Coyote Valley. As demonstrated in the Climate Smart San José document, the City of San José has an interest in clean energy infrastructure, particularly as we transition to renewable energy the need and demand for energy storage will continue to increase. Climate Smart San José also includes future updates as part of the Climate Action Plan one of which is focused on developing policies around carbon sequestration from natural and working lands. While there are currently no existing*

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<sup>8</sup> Envision San José 2040 General Plan, Chapter 6, Page 33

<sup>9</sup> Envision San José 2040 General Plan, Chapter 6, Page 34

<sup>10</sup> Envision San José 2040 General Plan, Chapter 6, Page 35

<sup>11</sup> Envision San José 2040 General Plan, Chapter 6, Page 18

<sup>12</sup> Envision San José 2040 General Plan, Chapter 6, Page 19

*Climate Smart policies related to carbon sequestration for natural and working lands, it is clearly indicated as a future action item, further substantiating that preservation of existing agricultural lands aligns with objectives from both Climate Smart San José and the Envision San José 2040 General Plan.*

*Additionally, City Council has provided direction to staff to shift the Urban Service Area north in Coyote Valley, as noted by Land Use Action LU-20.14. While the property is currently located within the Urban Service Area, staff will propose in the future to remove the Urban Service Area from the portion of Coyote Valley where the project site is located.*

#### 4. Zoning Consistency

The subject site is located in the **A Agricultural Zoning District**. The purpose of the Agricultural District is to provide for areas where agricultural uses are desirable. The regulations contained in this district are intended to provide for a wide range of agricultural uses as well as implementing the goals and policies of the General Plan. The proposed project includes the construction of a utility facility (energy storage and transmission facility) on an approximately 128-gross acre site. While the proposed use does not exactly meet the zoning code's definition of *Utility Facility*, staff have previously approved permits for energy storage facilities under this enumerated use, , and for the purposes of this application the use will be assessed under the *Utility Facility* as it is the closest match for the proposed use, as defined in your application.

##### Land Use

Pursuant to [Section 20.200.1310](#) of the Zoning Code, a *Utility Facility* is defined as “any building, structure, plant, equipment or use for the provision and operation of utility services including, but not limited to water, sewage disposal, telephone service, telegraph service, communications services, telecommunications or cable television. Utility facility does not include electrical power generation facilities but does include electrical transmission facilities, and may include an incidental resident caretaker unit.”<sup>13</sup>

**Table 20-30**

Use	Required Permit
Utility Facilities, excluding corporation yards, storage or repair yards, and warehouses	Conditional Use Permit

**Table 20-40 Agricultural Development Standards**

Development Standards	Requirement
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<sup>13</sup> City of San José Municipal Code, Title 20, Chapter 20.200 Definitions, Section 20.200.1310 – Utility facility

Minimum lot area	20 acres*
Setback from streets and highways	50 feet
Setback from abutting properties zoned or used for residential purposes	300 feet
Setback from abutting properties zoned or used for other than residential purposes	50 feet
Maximum height	35 feet
Maximum floor area	.80

\*(40 acres for properties in the Coyote Valley Agriculture Overlay)

*Staff Comments: Per [Table 20-30](#) of [Section 20.20.100](#) of the Zoning Code, a Utility Facility in the A Agricultural Zoning District requires the issuance of a Conditional Use Permit. Also, as you noted in your application the minimum lot area for sites in the Coyotes Valley Agriculture Overlay is 40 acres. Your application included a Standby/Backup facility, which requires a Special Use Permit, however, a Standby/Backup facility specifically operates when there is a power outage, whereas based on your project description your proposed use would be part of the grid and operate whether or not there are power outages.*

*Although a Utility facility can be approved with a Conditional Use Permit in Agriculture zoning districts, based on the above referenced General Plan policies, staff would not likely be able to make the findings to support the permit, and would likely recommend denial. Pursuant to Section 20.100.720(A), the Planning Commission, or the City Council, may issue a conditional use permit only after finding that the conditional use permit, as approved, is consistent with and will further the policies of the General Plan, applicable specific plans and area development policies. As discussed in this letter, the project proposal to remove 128 acres of prime farmland from agricultural use and develop with an energy storage facility is not consistent with the Agriculture General Plan Designation, the Coyote Valley Agriculture Overlay, and numerous policies of the Envision San José General Plan, as such staff would likely recommend denial. As stated in the General Plan, “building intensity in this designation will be greatly limited” and as such your proposed project would significantly increase the building intensity at the site.*

#### Planned Development Rezoning

You indicated in your application the option to pursue a Planned Development Zoning for the proposed use. Given the site’s location in the Coyote Valley Agriculture Overlay and the Agriculture General Plan Land Use Designation staff has determined the use to be inconsistent with the General Plan Land Use Designation. Pursuant to State law (Government Code Section 65860) Charter Cities are required to align the zoning and General Plan Land Use designation for all sites in their jurisdiction. Because the proposed use of the site is inconsistent with the General Plan a PD Zoning would also be inconsistent.

The General Plan offers additional policies which recommend limiting the use of Planned Development zonings unless sites have unusual configurations or exceptional circumstances which warrant specialized development standards. Furthermore, the General Plan states that standard zoning districts should be used to promote more consistent development patterns.

**Goal IP-1 – Land Use / Transportation Diagram**

IP-1.8 Use standard Zoning Districts to promote consistent development patterns when implementing new land use entitlements. Limit use of the Planned Development Zoning process to unique types of development or land uses which cannot be implemented through standard Zoning Districts, or to sites with unusual physical characteristics that require special consideration due to those constraints.<sup>14</sup>

**Goal IP-8 – Zoning**

IP-8.5 Use the Planned Development zoning process to tailor such regulations as allowed uses, site intensities and development standards to a particular site for which, because of unique circumstances, a Planned Development zoning process will better conform to Envision General Plan goals and policies than may be practical through implementation of a conventional Zoning District. These development standards and other site design issues implement the design standards set forth in the Envision General Plan and design guidelines adopted by the City Council. The second phase of this process, the Planned Development permit, is a combined site/architectural permit and conditional use permit which implements the approved Planned Development zoning on the property.<sup>15</sup>

**5. Environmental Review - California Environmental Quality Act (CEQA)**

Additional information regarding environmental review of the project in conformance with CEQA will be provided upon full submittal of a formal application.

**6. Next Steps**

Should you wish to proceed with this project you would need to apply for and receive approval of a General Plan Amendment to change the land use designation and revise the policies regarding Coyote Valley and Rural Agricultural preservation. You would also need to apply for either a Conditional Use Permit or Planned Development Zoning for the proposed use, in addition to a Planned Development Permit for the project. Both permit processes require an Environmental Impact Report, a community meeting, and would be heard at a public hearing where the Planning Commission will make a determination which is appealable to the City Council. As discussed in this letter and based on the above referenced General Plan policies and analysis, staff would likely recommend denial for this project as proposed because it is inconsistent with core objectives of the General Plan.

Please be advised that this summary does not constitute a final review. Additional

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<sup>14</sup> Envision San José 2040 General Plan, Chapter 7, Page 5

<sup>15</sup> Envision San José 2040 General Plan, Chapter 7, Page 21

comments will be provided upon submittal of a complete Planning entitlement application. Should you have any questions, you may contact me at [brent.carvalho@sanjoseca.gov](mailto:brent.carvalho@sanjoseca.gov) or (408) 535-6862. You may also contact the Supervising Planner overseeing this project, Martina Davis, at [martina.davis@sanjoseca.gov](mailto:martina.davis@sanjoseca.gov).

Best regards,

/s/ Brent Carvalho

Brent Carvalho  
Project Manager  
City of San José